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COMPETITION LAW AND INTERNATIONAL TRADE: THE EUROPEAN UNION AND THE NEO-LIBERAL FACTOR

David J. Gerber[†]

Abstract: Ordoliberalism, a particular version of European Neo-Liberal thought, has played a central role in the relationship between competition law and trade policy with the European Union. The substantive component of this body of thought, which is based in Germany, emphasizes the importance of a transaction-based economy and economic freedom; the process component emphasizes the need for juridical processes in economic policy-making. Ordoliberalism has shaped European Union competition law and trade policy and their roles in European integration, and its weakening may cause major changes in that relationship.

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I. INTRODUCTION

As the perceived importance of the relationship between competition law and international trade policy has increased in recent years, discussions have focused on two dimensions of that relationship: statements of government policy and patterns of conduct associated with those policies. As important as such studies are, they seldom analyze another important component of the picture that can provide valuable insight: the structures of thought relating to these two areas of policy. The conceptual frameworks and systems of ideas that influence decisions in the areas of competition law and trade policy provide keys to understanding how each operates individually and how they relate to each other, both in theory and in practice.

I briefly explore this dimension of the relationship between competition law and trade policy in the European Union ("EU"),¹ probing the dynamics of the relationship between these two areas of decision-making and examining the influences that shape reactions, perceptions and decisions. My focus is on two components of this relationship. The first is competition law as a component of trade policy. Competition law affects basic structures of the market and key areas of economic conduct, and therefore it necessarily affects imports into the market and exports from it, constituting a form of trade policy. The second is the influence of competition protection values on trade policy formulation and implementation. Here the issue is the degree to which trade policy and competition law serve the same goals.

My comments in this essay center on two claims. The first is that in the European Union both of these aspects of the relationship between competition law and trade policy revolve around one fundamental issue: how decision-makers understand the role of law and its relationship to economic conduct. Since the inception of the Community in 1957, there has been a fundamental conflict between a "juridical" conception of that relationship and a "political" conception of it, and I here sketch the dynamics of that relationship.

¹ The terms "European Union" and "European Community" will here be used interchangeably, with choices based on the context.

The second claim is that a specific tradition of thought has been at the center of this conflict and that a better understanding of that body of thought and its influence reveals much about the current relationship between competition law and trade policy in the Union. This intellectual and institutional tradition is generally called "ordoliberalism," but I will often refer to it more generally as "economic constitutionalism." It has been a powerful force in economic policy thinking in general, and competition law developments in particular, throughout the process of European integration. Threatened changes in its role raise fundamental questions about the future development of the relationship between competition law and trade policy in the Union.

I will first review the central tenets of this body of thought, then sketch its impact on competition law and trade policy and some of the reasons for that influence. Finally, I will explore its role in the dynamics of competition law and trade policy today. I will be using the story of ordoliberalism as a tool for revealing patterns of influence on decisions and on the institutional structures of decision-making.

II. ORDOLIBERALISM: A GERMAN NEO-LIBERAL VISION

Despite the enormous importance of ordoliberal thought in the EU, this tradition has received very little attention outside of Europe and remains all but unknown in the United States.² Moreover, except in Germany, awareness of these ideas has been confined almost exclusively to economists. This makes it important to review briefly its main features and its path to influence.³

² For exceptions, see, e.g., *GERMAN NEO-LIBERALS AND THE SOCIAL MARKET ECONOMY* (Alan T. Peacock & Hans Willgerodt eds., 1989); *STANDARD TEXTS ON THE SOCIAL MARKET ECONOMY* (W. Stützel et al. eds., 1982).

³ Some of the material in sections II and III of this piece is condensed and adapted from David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 AM. J. COMP. L. 25 (1994). The extensive footnote references in that article allow me to minimize citations in this essay.

A. *Historical Context*

Ordoliberalism was born against the background of the Weimar Republic and the Third Reich.⁴ It can be seen as an attempt to find a stable order amidst the political and economic chaos that so frequently dominated Weimar and the destruction and totalitarianism that followed it. Ordoliberal thinkers sought to understand and to avoid both.

The movement began during the late 1920s and 1930s as a small group of jurists and economists began to see the relationship between law and economics as the key to the failures of Weimar. The key figures were the legal scholar Franz Böhm and the economist Walter Eucken. A common theme of their work was the belief that the lack of an effective, dependable legal framework had led to economic and political disintegration in Germany and elsewhere. In particular, they believed that the inability of the legal system to prevent the creation and misuse of private economic power was a primary source of the problem. During the war years, members of this group worked in relative obscurity with no access to power, and only after the war did they become influential.

B. *Perspectives and Methodology*

A basic component of the ordoliberal perspective was provided by Walter Eucken, who developed a way of thinking about economic policy that he called "thinking in orders" (*Denken in Ordnungen*). As he put it, "The perception (*Erkenntnis*) of economic orders (*Ordnungen*) is the first step in understanding economic reality."⁵ The basic idea was that beneath the complexity of economic data were fundamental ordering patterns (orders) and that only by recognizing these patterns could one understand the dynamics of economic phenomena.⁶

Eucken saw two fundamental "orders." One he called the "transaction economy" (*Verkehrswirtschaft*) in which economic conduct was organized through private, transactional decision-making. Private enterprises generated their own plans on the basis of their evaluation of the

⁴ For discussion of the formative years of the ordoliberal tradition, see *id.* at 28-35, ANDREAS HEINEMANN, *DIE FREIBURGER SCHULE UND IHRE GEISTIGEN WURZELN* (1989); FRITZ HOLZWARTH, *ORDNUNG DER WIRTSCHAFT DURCH WETTBEWERB* (1985).

⁵ WALTER EUCKEN, *GRUNDSÄTZE DER WIRTSCHAFTSPOLITIK* 34 (1952).

⁶ See Gerber, *supra* note 3, at 38-43.

incentives and disincentives created by economic competition. The second was the centrally administered economy (*Zentralverwaltungswirtschaft*) in which governmental commands organized economic activity according to criteria external to the economic system.⁷ Popular versions of this distinction became commonplace in the context of the Cold War, but its contours were far less perceptible before that time.

This systemic perspective is a key to the relationship between competition law and trade policy in ordoliberal thought. Eucken's "orders" were intellectual constructs that focused on the relationships among components of an economic system. Certain characteristics "belonged" to a transaction economy because they fit together in ways that necessarily increased the capacity of that system to achieve its goals. For example, the protection of economic freedom and low barriers to market entry were characteristics of a transaction economy that tended to reinforce each other and, thereby, to increase the effectiveness of the system as a whole.

Eucken then showed that the intermingling of components from these two fundamentally incompatible "orders" in an actual economic system necessarily impaired the functioning of that system. A transaction economy would be harmed, for example, by each instance of governmental intervention, and vice versa. Although this insight hardly seems powerful today, it had been rarely and barely developed at the time.

C. *The Problem and Its Solutions*

The problem, therefore, was how to protect the transaction "order" from harm, and here the ordoliberals saw two basic threats. One was governmental power. Government intervention in the economy necessarily reduced the effectiveness of the market economy, and it had to be controlled if the transaction economy and its benefits were to be realized.

The second threat was private economic power. Where individuals or groups had the power to influence the conduct of other market participants, the model did not work properly. To protect the economic freedom of individuals from the power of government was not enough, because powerful economic institutions could also destroy or limit such freedom. The or-

⁷ For detailed discussion, see Gernot Gutmann, *Euckens Ansätze zur Theorie der Zentralverwaltungswirtschaft und die Weiterentwicklung durch Hensel*, 40 ORDO 55 (1989).

doliberals saw this as the lesson of the Weimar period, where political and social institutions were undermined by private economic power.⁸

The ordoliberal solution to these two problems was to embed the market in a "constitutional" framework which would protect the process of competition from distortion *and* minimize governmental intervention in the economy. The centerpiece of the ordoliberal program was, therefore, the concept of an economic constitution.⁹ The core idea was that a community should make decisions about the kind of economy it wants in the same way that it makes decisions about the political system it wants. These decisions represent fundamental choices, and, once made, the legal system should be required to implement them.

The effectiveness of an economic constitution depended, the ordoliberals said, on structuring the legal system in ways that would necessarily implement that constitutional choice. Where a political unit chose a transaction economy in its economic constitution, for example, that choice directed that governmental policies be designed to create and to maintain that system. Ordoliberals called this "*Ordnungspolitik*" (order-based policy),¹⁰ and it required that individual governmental decisions both flow from and be limited by the principles embodied in the economic constitution.

Ordnungspolitik also had a process dimension. In order for a transaction economy to achieve its goals, the governmental involvement must itself have certain characteristics and play certain roles. Above all, government could act only to implement the general norms or laws that derived from the economic constitution; government officials would not have discretion to intervene in the economy except for the purpose of enforcing those principles.

Central to this image of law is its neutrality and objectivity: the sphere of "law" is to be outside the discretionary power of those wielding governmental power. The state has to provide a basic level of "legal security" (*Rechtssicherheit*) by assuring that law is knowable, dependable and

⁸ Franz Böhm's pathbreaking article on this subject was published in 1928. See Franz Böhm, *Das Problem der privaten Macht. Ein Beitrag zur Monopolfrage*, 3 DIE JUSTIZ 324 (1928), reprinted in FRANZ BÖHM — REDEN UND SCHRIFTEN 25 (Ernst-Joachim Mestmäcker ed., 1960).

⁹ See Gerber, *supra* note 3, at 44-49.

¹⁰ This term is exceptionally difficult to translate into English, because it depends so much on the ordoliberal thinking in which it is imbedded. The "order" in "order-based policy" is not "order" merely for the sake of ordering, but "order" in the sense of Eucken's economic orders. That referent is not, however, apparent in English translation.

shielded from excessive manipulation. Moreover, government does not direct the processes of the economy. It merely establishes the structural conditions within which those processes can function effectively.

The ordoliberal program thus required that *all* governmental decisions that might affect the economy flow from the economic constitution.¹¹ Its adherents repeatedly emphasized the need for an “integrated policy perspective” (*Ganzheitsbetrachtung*) in which each individual decision had to be understood as part of a greater whole from which it received its meaning and effect. Only thus could the program function effectively. Monetary, social, labor and trade policy, for example, all had to flow from the same basic principles and support each other.

D. *The Roles of Competition Law and Trade Policy*

For the ordoliberals, economic competition was the essence of a transaction economy.¹² The greater its role in the economy, the more effectively the system functioned. Thus, the keystone of their program was a new type of law called “competition law,” which was designed to protect competition. This ordoliberal creation has evolved into the European concept of competition law, and without it the development of the European Union is unimaginable.¹³

The ordoliberals viewed competition law as an indispensable part of their program. Monetary and other policies designed to foster competition would have little effect, they argued, if firms could either act in concert in setting prices, determine output, or foreclose opportunities for competition. For Eucken and his colleagues, history, particularly Weimar history, had demonstrated that competition tended to collapse, because enterprises preferred private (i.e., contractual) regulation of business activities rather than

¹¹ “All principles — the constitutive as well as the regulative — belong together. To the extent that economic policy is consistently based on them, a competitive order will be created and made operational. Every principle receives its meaning only in the context of the general blueprint (*Bauplan*) of the competitive order.” EUCKEN, *supra* note 5, at 304.

¹² Eucken’s concern was not with competition in the loose sense found in common usage, but with a specific form of competition, namely, “perfect” or “complete” competition — that is, competition in which no firm in a market has power to coerce conduct by other firms in that market. The concept was not new to Eucken, but he gave it a new function. See Gerber, *supra* note 3, at 43.

¹³ The originality of this competition law idea is often overlooked, but to do so undervalues its importance and influence. For discussion, see *id.* at 62-64.

competition and because enterprises were frequently able to acquire such high levels of economic power they could eliminate competition.

The ordoliberals conceived competition law as a means of preventing this degeneration of the competitive process.¹⁴ Competition law would “enforce” competition by creating and maintaining the conditions under which it would flourish. Economic science would establish the general principles, and an independent monopoly office would enforce those principles. This fundamentally new concept flowed from the conceptual framework of ordoliberalism and rested on its theoretical underpinnings.

Its focus was the problem of private economic power. From the ordoliberal perspective, such power necessarily threatened the competitive process, and the primary function of competition law was to eliminate it or at least to prevent its harmful effects. They sought to prohibit or to eliminate monopoly positions because their very existence distorted the competitive order.¹⁵ Recognizing that economic power positions were, to some degree, inevitable, the ordoliberals then developed the concept of “as-if” conduct controls.¹⁶ The idea was that one could use economic analysis to determine what range of conduct would be possible under conditions of perfect or complete competition, and any conduct by a powerful firm that fell outside that range would be prohibited. It was the core of the notion of abuse of a market-dominating position that is found in article 86 of the Rome Treaty and in virtually all European competition laws.

The ordoliberal program required a specific institutional framework for creating, applying and enforcing its substantive provisions. In it, the legislature would enact competition laws based on the economic constitution, an independent monopoly office would assure compliance with that law, and, where necessary, the judiciary would supervise interpretation of the principles by the cartel office. The executive branch of government would play virtually no role in this scheme. The monopoly office would

¹⁴ See, e.g., FRANZ BÖHM, WETTBEWERB UND MONOPOLKAMPF 363-70 (1933).

¹⁵ The demand for an absolute prohibition of horizontal agreements was closely associated with the ordoliberals (particularly Franz Böhm). See generally David J. Gerber, *Law and the Abuse of Economic Power in Europe*, 62 TULANE L. REV. 57, 64-66 (1987) [hereinafter Gerber, *Abuse of Economic Power*].

¹⁶ Leonhard Miksch, a leading student of Walter Eucken, was chiefly responsible for elaborating and refining this idea. See, e.g., LEONHARD MIKSCH, WETTBEWERB ALS AUFGABE: GRUNDSÄTZE EINER WETTBEWERBSORDNUNG (2d ed. 1947); *Die Wirtschaftspolitik des Als Ob*, 105 ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT 310 (1949). Not all ordoliberals were enthusiastic about the “as-if” standard.

apply legal principles according to objective standards; there was not supposed to be any "discretion."

From an ordoliberal perspective, international trade policy played the same role in the international economy that competition law played in the domestic economy.¹⁷ The same principles informed both sets of policies. Just as competition law was to remove obstacles to domestic competition, trade policy was to remove obstacles to trade among nations. In general, governments would not be allowed to control imports or to subsidize their own industries, except as provided by the general principles of the economic constitution.

E. Ordoliberalism's Role in Germany

Experience with ordoliberal ideas in Germany was critical to their impact in the European Community. Their pervasive influence on German policymakers within Community institutions provided the conduit for these ideas, and Germany's economic success was the driving force. The small band of ordoliberals emerged from obscurity during the immediate postwar period, and many played leading roles in occupied Germany.¹⁸ They were among the few qualified Germans who were not tainted by ties to Nazism, and thus they met the rigorous United States' denazification standards. Moreover, their positions on economic and political issues comported well with those of the United States occupation authorities, who liked their market orientation and agreed with them that the high levels of cartelization of German industry had contributed to Hitler's political success.¹⁹

By the early 1950s, ordoliberal ideas had become generally popular. The ordoliberals' promise of a clear set of guidelines that would constrain both government and private economic power, while producing rapid economic growth became intertwined with the program for a "social market economy." The "social market economy" has dominated the evolution of German thought and attitudes about economy and society ever since. With the economic and political successes of this program during the 1950s, ordoliberal concepts increasingly became part of the basic vocabulary of

¹⁷ See generally GERMAN NEO-LIBERALS AND THE SOCIAL MARKET ECONOMY, *supra* note 2.

¹⁸ See Gerber, *supra* note 3, at 57-62.

¹⁹ See generally REINHARD BLUM, SOZIALE MARKTWIRTSCHAFT: WIRTSCHAFTSPOLITIK ZWISCHEN NEOLIBERALISMUS UND ORDOLIBERALISMUS 184-215 (1969).

policymakers throughout German government. By the end of the decade, just as European Community institutions were taking shape, ordoliberal perspectives, values and assumptions had become part of the orthodoxy of political and economic thought in Germany.

The enactment of a competition law was an important part of this program. For almost a decade after the war, the competition law issue was a focus of political and economic discussion in Germany. In 1956, the Law Against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) ("GWB") was finally enacted.²⁰ The basic structures and the vocabulary of the act, which is still in effect, reflect strong ordoliberal influence.²¹ The nearly decade-long public debate surrounding the passage of the GWB and the experience in implementing those provisions made German policymakers familiar with competition law issues to an extent not available to other European countries.

F. Ordoliberalism and European Neo-Liberalism

Before turning to the role of ordoliberal thought in the European Community, it is important to note ordoliberalism's ties to other forms of neo-liberal thought in Europe. German neo-liberal thought influenced policymakers in many parts of Europe during the post-war period, and ordoliberals (such as Wilhelm Röpke in Switzerland) and those much influenced by ordoliberalism (such as Friedrich Hayek in England) were often at the center of the revival of this neo-liberal tradition.²² Moreover, there were indigenous strains of neo-liberalism in other countries that tended to become interwoven with the German variety. It was the German neo-liberals who provided the best-developed methodology for achieving neo-liberal goals, but these ties to other neo-liberals were critical to their success in Community institutions.

²⁰ Gesetz gegen Wettbewerbsbeschränkungen [GWB], 1957 Bundesgesetzblatt [BGB1.] 1081. The leading commentary on German competition law is ULRICH IMMENGA AND ERNST-JOACHIM MESTMÄCKER, KOMMENTAR ZUM GWB (2d ed. 1992).

²¹ Substantively, the GWB generally prohibits cartels, and it includes a variety of measures aimed at preventing the abuse of economic power, including the quintessentially ordoliberal "as-if" conduct standard. The law's application and enforcement mechanism also follows ordoliberal prescriptions; it creates a relatively autonomous office (the Bundeskartellamt — FCO) to enforce the law and virtually excludes private antitrust suits.

²² See Gerber, *supra* note 3, at 31-32, 70-71.

III. ECONOMIC CONSTITUTIONALISM IN THE EUROPEAN COMMUNITY

We can now focus on the roles of ordoliberal ideas in the European Union, particularly their impact on the relationship between competition law and international trade. Those roles have been little discussed outside of Germany, in part because it has not been considered politically appropriate to talk about national sources of influence within the Community, but they have influenced the relationship between competition law and trade policy on several levels.

A. *Economic Constitutionalism and the Decision-Making Process*

The most fundamental level involves basic structures and assumptions of decision-making. Ordoliberals and their ideas were critical in establishing the conception that the Rome Treaty represented a constitutional structure in which juridical processes (i.e., the reasoned application of general principles by "objective" decision-makers) should dominate decision-making. This conception of the role of law is a key to the relationship between competition law and trade policy.

Viewing the Treaty of Rome as a "constitutional framework" for decision-making has become the dominant perspective in recent years, and thus many are unaware or have forgotten that at the treaty's inception few viewed it that way.²³ From the earliest years of the Community, this constitutionalist conception of decision-making has vied for influence with an explicitly political conception of the decision-making process that I will here call the industrial policy conception. From this perspective, law is seen primarily as an instrument of policy which political powerholders wield in response to political and economic exigencies and pressure from their constituents.

At the outset, the conflict between these two basic views of the decisional process was open and confrontational, and through the mid-1960s, the industrial policy conception was an important rival of economic constitutionalism.²⁴ Support for it was particularly strong among French officials,

²³ For general discussion of the process of "constitution-making" in the EU, see Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

²⁴ See generally Gerber, *Abuse of Economic Power*, *supra* note 15, at 64-66.

many of whom were at the time imbued with the ideas and culture of *planification* and *dirigisme*.²⁵

Ordoliberals and their ideas were critically important in the gradual ascendancy of economic constitutionalism over industrial policy thinking in many areas of Community activity.²⁶ In particular, the German officials who were in leading positions within the commission continually and powerfully propagated this conception of the decision-making process. The most important of these may have been Walter Hallstein, the first president of the European Commission. Hallstein had been a professor of law in Germany before the war and had become a committed follower of ordoliberal ideas in the years after the war. Ordoliberal conceptions of the rule of law and the economic constitution within the Community pervade his speeches and writings,²⁷ as with those of virtually all other Germans in key positions within the Community.²⁸

These personal influences combined with growing appreciation of the integrative utility of such decisional processes, increasing respect for the successes of the German social market economy, and a changed political situation in France to allow economic constitutionalism to gain ever greater influence. Today, ordoliberal ideas have become an important component of the culture of both the commission and the court. For example, they contribute to the emphasis on protecting the neutrality and objectivity of decision-makers, the establishment of quasi-judicial procedures and standards for decision-making, and the general demand that decisions be justified by reference to legal principles rather than merely to political interests. The industrial policy conception has remained, however, a contestant for influence in all areas and a powerful force in some. As we shall see, its fortunes appear to be improving.²⁹

²⁵ For discussion of French economic planning see Henri Guillaume, *Implications of the New Indicative Planning*, in FRENCH INDUSTRIAL POLICY 119, 124-26 (William J. Adams & Christian Stoffaes eds., 1986).

²⁶ For discussion, see Gerber, *supra* note 3, at 69-72.

²⁷ See, e.g., WALTER HALLSTEIN, EUROPE IN THE MAKING 28 (1972) ("What the Community is integrating is the role of the state in establishing the framework within which economic activity takes place.")

²⁸ See, e.g., ALFRED MÜLLER-ARMACK, AUF DEM WEG NACH EUROPA (1971).

²⁹ See *infra* part V.

B. Ordoliberalism and Competition Law: Characteristics of EU Competition Law

The influence of ordoliberalism has been strongest in the area of competition law, which has served as a kind of anchor for ordoliberal ideas within the Community. Competition law has been a motor of European integration, and it is here that economic constitutionalist thought has played its most prominent roles.³⁰

This influence has been due in large measure to the primary role of German nationals in developing the competition law system. As the institutions of the Community were being created, some form of competition law was generally considered necessary to prevent the erection of private barriers to cross-boundary trade. There was, however, very little relevant experience in Europe with such problems, except in Germany, where competition law issues had been a major focus of attention for almost a decade and a sophisticated competition law had recently been established. Thus, German officials came to play the central role in shaping the European competition law system.³¹ These officials sought to fashion a system that reflected ordoliberal ideas and German experience with competition law, and the EU competition law system reflects this influence in both its procedural and substantive structures.

The most fundamental issue in creating the competition law system was the conflict between economic constitutionalism and industrial policy. In the early years of the Community two quite different images of competition law drawn from fundamentally different national experiences confronted each other. German participants tended to view the competition law system as fundamentally juridical. For them, the primary guide to decision-making should be legal analysis. They saw the objectivity and neutrality of the juridical process as necessary for achieving any effective progress toward integration and for establishing the legitimacy of competition law decisions.

The French viewed competition law as a component of industrial policy; it was, in essence, a political process in which the national interests

³⁰ For further discussion of the evolution of Union competition law, see David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT'L L.J. 97 (1994) [hereinafter Gerber, *Transformation*].

³¹ See generally Gerber, *supra* note 3, at 73-74.

of the member states were to be protected and maximized. Decisional outcomes were to be primarily determined by the interplay of the political and economic interests of the member states.

Largely due to German influence, the juridical conception gradually prevailed during the early 1960s.³² The internal processes of the competition directorate ("DGIV") were designed to provide objectivity and at least quasi-judicial decision-making procedures. In particular, decision-makers within the system were encouraged to understand their decisions as the application of legal principles rather than the result of political compromises.

The influence of ordoliberalism within DGIV has also been institutionalized. For example, the competition directorate is virtually always headed by a German national, thus cementing close ties between German and EU competition law. Moreover, ordoliberal ideas have become part of the culture of decision-making in DGIV. Competition law has come to be seen primarily as a juridical system in which norms generated by the commission and Union courts (the European Court of Justice and the Court of First Instance) provide authoritative guidelines for decision-making.

The interpenetration of German and EU competition law is also apparent at the substantive level. Concepts developed in German competition law frequently find their way into the competition law of the Community, and an understanding of German competition law concepts is often valuable for understanding Community competition law.³³

C. *Economic Constitutionalism and Trade Policy*

Economic constitutionalism has never played the predominant role in trade policy that it has played in competition law, but its roles have nonetheless been significant.³⁴ Its influence was more important during the formative period of the Community than it is today, but procedures established during that period generally remain in place, and the associated

³² The procedural framework of the competition law system was, for example, created during the early 1960s by a committee headed by Arved Deringer, a German lawyer and member of the European Parliament. For discussion, see D. G. GOYDER, *EEC COMPETITION LAW* 31-43 (1988).

³³ See, e.g., Gerber, *Abuse of Economic Power*, *supra* note 15, at 93-94.

³⁴ For discussion of the process of trade policy formulation and implementation in the EU, see J. P. HAYES, *MAKING TRADE POLICY IN THE EUROPEAN COMMUNITY* (1993).

attitudes and expectations often continue to color and to channel decision-making.

There is, for example, pressure to justify trade decisions by reference to conceptions of fairness and to fundamental principles of the Union's economic order. Accordingly, in seeking to influence trade policy decisions, it is usually not enough for a country or a group of countries merely to allege harm to domestic enterprises. There is a presumption that such decisions must be justified on principled grounds. These principles of decision are often quite vague (e.g., fairness or "community interest"), and the presumption is often not applied in cases that have important political implications. Nevertheless, in many areas the decisional process operates, and is constrained by, juridical forms and discourse. This is notably so, for example, in regard to anti-dumping law, one of the central components of trade policy.³⁵

The substantive analog to this process factor in trade policy formulation is the proposition that purely protectionist decisions should generally be seen as inconsistent with the fundamental principles of the Union.³⁶ There is a presumption that such decisions should not be allowed except under special circumstances. There are many examples of protectionist decisions, but there is also a discourse that requires that protectionist decisions be justified as exceptions to the general principles of economic constitutionalism, and this alone limits protectionist pressures.

IV. ECONOMIC CONSTITUTIONALISM AND THE RELATIONSHIP BETWEEN COMPETITION LAW AND TRADE POLICY

This brief look at the roles of economic constitutionalism in competition law and trade policy in the EU reveals the degree to which the economic constitutionalist perspective has shaped the relationship between these two areas. In essence, it has provided a set of procedural and substantive principles which tend to integrate the two areas of decision-making. The central principle of ordoliberalism that policy decisions should flow from the same constitutional framework is at the core of the relationship.

³⁵ See generally MARIO MARQUE MENDES, *ANTITRUST IN A WORLD OF INTERRELATED ECONOMIES: THE INTERPLAY BETWEEN ANTITRUST POLICIES IN THE US AND THE EEC* 167-77, 193-97 (1991).

³⁶ See generally Jacques H.J. Bourgeois, *Antitrust and Trade Policy: A Peaceful Coexistence? European Community Perspective* — I, 17 INT'L BUS. LAW. 58 (1989).

A. *Competition Law as Trade Policy*

This integrating influence has been particularly evident in structuring competition law's role as a component of trade policy. The issue is whether competition law is used in ways that distort trade and investment flows across the Union's external borders; it is at the center of current international controversies about the relationship between competition law and trade policy. In the EU, the interplay of the substantive and process components of economic constitutionalism has tended to limit the use of competition law for protectionist and other trade manipulation purposes.

The substantive component of economic constitutionalism demands that competition law serve the basic political decision in favor of free markets and a transaction economy. Therefore, its function is to advance the cause of competition *generally* (or universally), not merely within a particular jurisdiction or polity. This conception has been a potent force in making EU competition law a broad, general system for protecting competition rather than one whose sole purpose is to reduce trade barriers among Member States. So conceived, competition law's substantive goals are directed against protectionist decisions.

The process factor in economic constitutionalism helps to effectuate this substantive policy. The ordoliberal demand that law, especially competition law, be understood in constitutional and juridical rather than instrumental and political terms has been the operative notion in this regard. In this view, the competition law system must be structured so as to implement the principles of the economic constitution and to prevent its use to achieve short-term political objectives. Following this precept, officials within DGIV have fashioned a competition law system whose decisional processes in themselves provide constraints on industrial policy and protectionist forces.

The requirement that decisions be based primarily on the juridical application of general principles tends, for example, to inhibit discrimination against foreign firms. The decisional process constrains decision-makers to apply the same principles to foreign firms that they apply to domestic firms (i.e., those within the Union). Any significant tendency to use competition law to favor domestic firms would be quickly apparent because

decisions are presented as public statements of the relationship between specific fact constellations and the relevant principles.

The decisional system undergirds this impact in other ways. For example, its procedures reduce the administrative discretion in which protectionist impulses thrive. Administrative decision-makers are subject to the requirement that decisions be based on juridical methodology. The culture of decision-making requires that they not make judgments primarily on the basis of political expediency. In the relatively infrequent situations in which competition law decisions may have important political ramifications, potential pressures on administrative officials are deflected to the commission as a whole, which may and often does take political factors into account in making final decisions.

The decisional process thus does not eliminate all protectionist influences. Such factors undoubtedly have played roles in specific competition law decisions; they are inevitable, and, in any event, typically unknowable. What is important here is that the discourse and structures of decision-making in competition law tend to restrain their impact.

B. Pro-competition Values in Trade Policy

If we look at the influence of pro-competition values on trade policy decisions, which is the second aspect of the relationship between competition law and trade policy that we are reviewing, the same themes reappear. Economic constitutionalism's unique intermingling of process requirements and substantive values has been a major factor in giving force to competition values in trade policy, although the influence of economic constitutionalism has been weaker here than in competition law, and, correspondingly, the influence of pro-competition values has remained more attenuated.

Economic constitutionalism's substantive demands have been important in requiring that the competition protection values be represented in trade policy decisions. These demands are anchored in article 110 of the Rome Treaty, which provides that the EU's "common commercial policy . . . contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers." Although there is controversy about the

the degree to which this provision binds decision-makers,³⁷ the important point is that it is the established policy of the Union to move toward trade liberalization.

Process factors provide important means for giving at least some degree of force to this injunction, and they necessarily play an important role in fostering competition values in the trade policy area. The EU's mechanism for responding to international dumping is, for example, structured largely along juridical rather than political lines. Decision-makers are to apply general principles of law to the facts of cases that have been presented and argued within a juridical framework. Thus, they are required to pay heed to competition issues as part of juridical proceedings in which today's decisions are considered in making tomorrow's decisions and charges of inconsistency can have serious ramifications.

V. LAW, POLITICS AND THE DECLINE OF ECONOMIC CONSTITUTIONALISM?

While the focus of this piece has been on the role of economic constitutionalism in shaping the relationship between competition law and trade policy in the European Union, the potential relevance of this analysis for current policy issues also deserves comment. If, as I suggest, economic constitutionalism has helped to shape that relationship in ways that reduce protectionist and industrial policy forces, what happens if the influence of economic constitutionalism wanes?

A. *The Uncertain Future of Economic Constitutionalism*

The pressures on economic constitutionalism are clearly increasing and are likely to continue to increase. In particular, the virtual completion of the 1992 program has made intra-Union trade almost free, allowing products that are imported into one of the member states to circulate freely within other member states. This increases the incentives for member states to seek protection against imports from outside the Union. With little remaining authority to protect their industries, their governments must turn to the Union for such protection.

³⁷ See, e.g., Bourgeois, *supra* note 36, at 59.

On many levels there is evidence of the increasing force of industrial policy thinking in Union decision-making. The Single European Act of 1986 explicitly introduced industrial policy factors into the Treaty of Rome by adding Article 130f. Article 130f includes in the explicit goals of the Community the strengthening of European industry and "the development of its international competitiveness,"³⁸ and the Treaty on European Union (the Maastricht Treaty) has continued this trend.³⁹

The vulnerability of economic constitutionalism has become apparent even in its bastion, competition law.⁴⁰ One example dramatically demonstrates the extent of industrial policy pressures. In late 1991 the Community's merger control regulation had been in effect for almost two years, and some sixty-five mergers had been noticed under its provisions without commission disapproval. This lack of action had led to widespread speculation that the commission did not have the political courage actually to use the regulation to prohibit a merger. In October of 1991, however, the court issued an order prohibiting a merger involving a Canadian corporation, De Havilland and a French/Italian consortium.⁴¹ The French and Italian governments protested vehemently that the Commission had been overly legalistic in applying the statute and should have paid greater heed to industrial policy factors in applying the Regulation. Since then the Commission has not prohibited any mergers.

B. Possible Consequences

If economic constitutionalism loses force, we can expect significant changes in the relationship between competition law and trade policy, at least with respect to the areas I have been discussing. That tradition of thought has provided key intellectual and institutional ties between these two areas, and its attenuation would reduce the force of these ties, with po-

³⁸ For discussion, see Manfred Caspari, *Zur Abgrenzung von Industriepolitik und Wettbewerbspolitik der EG*, in *WETTBEWERBSFRAGEN DER EUROPÄISCHEN GEMEINSCHAFT* 9, 12-13 (Helmut Gröner ed., 1990).

³⁹ For discussion, see Henning Klodt, *Europäische Industriepolitik nach Maastricht*, 3 *DIE WELTWIRTSCHAFT* 263 (1992).

⁴⁰ See generally Gerber, *Transformation*, *supra* note 30, at 124-37.

⁴¹ See generally Andrew Wachtman, *The European Community Commission de Havilland Decision: Potential Problems in Community Merger Control are Realized*, 21 *CAPITAL L. REV.* 685 (1992); Michael J. Reynolds, *The de Havilland Case: A Watershed for EC Merger Control*, 10 *INT'L FIN. L. REV.* 21 (1991).

tentially far-reaching consequences. In particular, it would probably allow industrial policy and protectionist forces to play larger roles in both competition law and trade policy.

One likely consequence of reduced influence for economic constitutionalism would be a diminished role for competition law in the Union and thus also for competition protection values in other areas such as trade policy. The appeal of economic constitutionalism has contributed to the competition law system's role as a motor of European integration. Moreover, competition values have enjoyed a high degree of respect in the EU, and DGIV officials have been particularly influential within the commission. A weakening of economic constitutionalism would be likely to undermine these roles.

If the force of economic constitutionalism wanes, this is also likely to impair the institutional processes that were built on its assumptions and that have been so important in combating protectionist tendencies. Particularly in competition law, the decisional process has been structured according to the economic constitutionalist mandate that decisions should be based on the application of general principles. This structure has been a key to the impact and the successes of competition law, and a weakening of that structure may well significantly impair its efficacy.

The waning of economic constitutionalism would tend to make the process less transparent, and outcomes less predictable. A constitutionalist process demands a high degree of openness in the presentation of arguments and in the public statement of grounds for decision. This generally increases the ability to predict decisional outcomes by restricting the range of acceptable outcomes.

A decline in the force of economic constitutionalism would similarly tend to increase the range of discretion on the part of administrative decision-makers. By reducing incentives to base decisions on the application of juridical principles, it would encourage administrative decision-makers to respond to other political and personal incentives. This would provide incentives for increased political instrumentalization of both competition law and trade policy. Given the political force behind protectionist demands, this is likely to be in the service of protectionist goals.

VI. CONCLUSION

In this piece I have tried to illuminate the central role of economic constitutionalist thought in structuring the relationship between competition law and trade policy in the European Union. This body of thought and the institutional processes which it has shaped have been at the core of this relationship, and thus understanding their roles reveals much about how this relationship operates today and how it may change in the future.

My comments on the role of economic constitutionalism have focused on it not only as an historical force, but also as an analytical factor that can be used to develop insights into the situation facing the Union and the world today. The origins of these ideas are in themselves not of primary importance in this context, but their influence and the potential consequences of its diminution are, and they deserve greater attention than they have received.

